Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

ROBERT FORD AND BOBBIE SUE FORD,
Petitioners,

v.

GACS, INCORPORATED AND
GENERAL MOTORS CORPORATION,
Respondents

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Did the appellate court apply an incorrect legal standard in its decision in which a punitive damage award was vacated contrary to the holding of this court in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* thereby depriving petitioner of his constitutional rights.

II. Are constitutional rights violated by the empty chair defense where one defendant escapes liability in a summary judgment ruling yet the remaining defendant is allowed to blame at trial the dismissed party.

THE PARTIES TO THE PROCEEDING

Including the parties named in the caption of this Petition the parties are:

Petitioners: Robert Ford and Bobbie Sue Ford, as individuals.

Respondents: GACS, Inc. ("GACS"), a corporation and General Motors Corporation ("GM"), both were parties to the proceedings in the United States District Court for the Western District of Missouri and the United States Court of Appeals for the Eighth Circuit. GACS is owned by a parent corporation, Allied Holdings, Inc. There is no parent or publicly held company which owns 10% of more of GM's stock.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Eighth Circuit dated September 7, 2001, is set forth in the Appendix, (265 F.3d 670). The order denying the petition for rehearing on October 16, 2001, is set forth in the Appendix. The opinions of the United States District Court for the Western District of Missouri dated August 6, 1999, and November 30, 1999, are set forth in the Appendix.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254. The United States Court of Appeals for the Eighth Circuit issued its Decision in this case on September 7, 2001. The motion for rehearing was denied on October 16, 2001. This Petition was timely filed.

CONSTITUTIONAL, STATUTORY, ORDINANCES AND REGULATIONS INVOLVED IN THIS CASE

Constitutional Issues

1. Seventh Amendment of the United States Constitution

In suit at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.

2. Fourteenth Amendment, United States Constitution

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of the life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Procedural History

On March 7, 1998, Robert Ford, (hereinafter "the Petitioner"), a resident of the Eastern District of Missouri, filed his complaint against GACS, Inc., f/k/a Delavan Industries, Inc. (hereinafter "GACS") and General Motors Corporation (hereinafter "GM"), alleging negligence and strict liability under §537.760 R.S.Mo. 1994. Defendants removed the action to the United States District Court of the Western District of Missouri based upon diversity of citizenship pursuant to 28 U.S.C. §1332(a). The Petitioner sought compensatory damages and punitive damages.

On June 29, 1999, GM filed a Motion For Summary Judgment to which the Petitioner filed a response on July 12, 1999. On August 9, 1999, the District Court granted the motion.

On August 30, 1999, the case proceeded to trial with GACS as the sole Defendant as corporate successor to the product manufacturer. A verdict was return in

Petitioner's favor on both the negligence and strict liability counts. The jury also determined that Plaintiffs proved by clear and convincing evidence that punitive damages were justified under Missouri law. GACS' motion for directed verdict on the punitive damages claim was denied. GACS' motion for Judgment Notwithstanding The Verdict was denied on November 30, 1999.

The Respondent, GACS, filed its notice of appeal to the Eighth Circuit Court of Appeals. The Petitioner filed his notice of cross-appeal to the Eighth Circuit Court of Appeals. The District Court's decision was affirmed on the verdict for compensatory damages, reversed on the punitive damages claim and affirmed on the summary judgment in favor of GM on September 7, 2001. Petitioner sought rehearing en banc on September 21, 2001. The motion for rehearing was denied on October 16, 2001.

The Petitioner has filed a Petition for Certiorari to this Honorable Supreme Court based upon the issues and argument presented herein.

STATEMENT OF THE FACTS

A. GACS Appeal

Plaintiff sustained personal injuries as an automobile transport driver, while "untying" an automobile that was secured to the transport trailer by means of chains and a ratchet mechanism. Plaintiff's trial evidence revealed this ratchet mechanism was known by GACS (and its predecessors) to have injured 622 individuals in 1990 alone.

GACS' trial evidence conceded that, in 1990, there was a 10% chance that, in any given year, a particular driver would be injured while tying or untying a vehicle (494 injuries divided by 4,903 drivers). Thus, even according to Defendant's evidence, every driver had a 1 in 10 chance of being injured each year with this product.

Plaintiff testified that, while tightening a vehicle down during the tightening process, a driver uses both hands on the bar that is used to turn the ratchet. However, during the process of untightening a vehicle, a driver may only use one hand to exert force on the bar, even though the amount of force required is the same (or more). This is because the untightening process requires the bar to be pulled as if the driver were further tightening the chain, so as to relieve the pressure of the ratchet against the pawl or dog, thereby allowing the driver to flip this pawl out of the way, so that the ratchet could be turned a partial turn in the unwinding direction (with the driver's one free hand). This is the process that must be followed unless a quick-release device is designed into the system. Plaintiff's truck was not equipped with a quick-release device. Plaintiff was injured while untying a one-ton four-wheel drive GM truck.

Plaintiffs' expert testified that the ratchet tie-down system was unreasonably dangerous because it required a dangerously high force level to be exerted by the driver in order to operate it. Plaintiffs' expert further testified to her opinion that the auto-hauling industry in general, and GACS in particular were aware of the dangers associated with this ratchet system well before Mr. Ford was injured.

Plaintiffs' expert based her opinions on various reports. One of these was a report (the University of Michigan/Miller report), produced in March of 1979, which concluded that there were 1,184 injuries that occurred during the one year covered by the study. She also testified to the existence of a 1979 patent which patented technology for a safer system. This 1979 patent demonstrated the availability of a safer quick-release mechanism.

Plaintiffs also introduced a 1979 letter received by Defendant to establish Defendant was aware that hundreds of drivers were being injured each year while exerting pressure on the tie-down bar, and that Defendant actually designed a quick-release system to reduce injuries but failed to use it on its trailer. Plaintiffs also proved a motorized torque wrench tie-down system had been created but not used.

Plaintiffs introduced records of the General Motors Haulaway Committee. GACS acknowledged that it was a member of this committee and that its president participated in that committee. These minutes revealed in July 12, 1984, "everyone seemed to have a problem of some sort with the tie-down mechanisms."

In November 17, 1986, the minutes reflected a subcommittee should investigate a quick-release ratchet for safety. The minutes for February 11 and 12, 1987, stated that the tie-down system was very labor-intensive and had a high driver injury frequency.

The October 24, 1991, minutes revealed a presentation was made which pointed out that the tie-down method required drivers to exert high levels of force, and in precarious positions. The presentation cited the loss

of highly-skilled employees to injuries occurring during the tying and untying of vehicles. At the same meeting, a video was shown which demonstrated the use of a quick-release ratchet tie-down system.

Plaintiffs introduced a report by an ergonomic expert retained by GACS to consult regarding the ratchet system and injuries. His report addressed injury statistics for 1990 which reveal 622 injuries. The report indicated that issues of reduced tie-down forces needed to be addressed.

Plaintiffs proved Defendant was aware of the hazards as early as 1979 when it received the University of Michigan/Miller report. Although it acknowledged that one of the purposes of this report was to reduce injuries to automobile transport drivers, Defendant made no attempt to obtain the underlying data analyzed in the report. Defendant admitted this report advised it that the tying and untying of vehicles was the single most error-prone task in the auto-hauling business.

Plaintiffs proved in 1979 Defendant designed a quick-release tie-down system and that the purpose of a quick-release ratchet was to increase the safety of drivers – specifically, in the untying of vehicles. Plaintiffs proved in 1979 the Safety Manager of a related company congratulated Defendant on developing the quick-release mechanism. The Safety Manager stated that, because of this new design, it had finally become a reality that drivers would not have to release the ratchet pawl while exerting pressure on the tie-down bar, and that this would eliminate *hundreds of injuries per year*. Nevertheless, Defendant did not include a quick-release mechanism on the trailer it sold until after 1994. This was so even though Plaintiffs proved in 1991 Defendant was

aware that drivers typically had to exert forces of 100 to 280 pounds on the ratchet and that 39.5 percent of all (drivers) injuries were related to tying down and untying.

Plaintiffs introduced a report from an engineer, Roger Mayne, a professor from the University of Buffalo, who generated a report which reflected measurements of forces used from 180 pounds to 280 pounds. Defendant acknowledged that even 100 pounds would be on the high level of what should be used.

Plaintiffs proved Defendant was also aware that for the year 1990, in the Ryder Auto Carrier Division, there were 622 lost-time injuries while using ratchets. Plaintiffs proved Defendant received these statistics, and threw them into the trash after looking at them.

Defendant also acknowledged that it was a participant in a study conducted by Prof. Drury. Defendant acknowledged that the Drury report stated that there was clearly a need for improved design of the tie-down system.

During the period between 1982 and 1986, Jack Smith was involved in test-loading the vehicles on transports with representatives of Defendant. In connection with this test-loading, Smith and others complained to Delavan about the amount of force that had to be used. Another test-load participant, Ron Jones, testified that when he test-loaded with Defendant he complained of high force levels. He was told by Defendant to wait until the trucks left the test-load area to fully tighten the load so that the manufacturers would not observe what is typically done.

Appeal Against GM

It is undisputed that the trailer which Plaintiffs allege was defectively designed was being used to haul GM automobiles. GM undertook to instruct the manufacturers of trailers used to haul GM cars as to the design of those trailers (and, specifically, the equipment used to tie down cars on those trailers). Plaintiffs presented an internal GM memo dated February 21, 1991, by GM engineers who were reviewing the design of the chain-and-ratchet tie-down system - - specifically, the concerns on the part of trailer drivers that the ratchet pawls were prone to "jumping out" which, in turn, was causing drivers to over-tighten the chains used as tie-downs. In the same memo, GM acknowledged that it would undertake to "instruct" manufacturers to include a special type of ratchet in the design of all their trailers and that it would consider methods by which manufacturers could retrofit existing trailers.

Plaintiffs presented testimony that GM participated in the testing and design of car-hauling trailers. Plaintiffs proved GM stated that it was going to work with the trailer manufacturers to test a new ratchet system and make a decision on the type of device to use.

Plaintiffs proved GM's records established tying down and loosening chains were related to 39.5 percent of injuries (to drivers), and that drivers typically exerted forces up to 280 pounds on tie-down bars. GM's records further noted that, because the current tie-down method required drivers to exert high levels of force, and in precarious positions, "it is strongly suggested that improvements/changes to the tie-down process be considered."

Plaintiffs proved a Director of Safety told GM that one of the topics to be considered by GM was the development of a system for securing vehicles on haulaway equipment that did not require drivers to "use excess force." GM's records revealed GM knew in 1987 tie-down system had a high driver injury frequency.

In its Motion for Summary Judgment, GM acknowledged that, at the time Mr. Ford was injured, he was using a ratchet system which did not have a quick-release device. GM further acknowledged that this quick-release device would eliminate the need for a driver to exert force during the untying process. GM also acknowledged that, according to Plaintiffs, (a) a quick-release device, among other possible options, would have prevented Mr. Ford's injury, and (b) GM prohibited the manufacturers of automobile transports from using an alternative tie-down system.

Plaintiffs submitted specific evidence in response to GM's motion for summary judgment that GM had prohibited alternative tie-down systems, and specifically, that GM prohibited use of a quick-release ratchet. In addition, Plaintiffs submitted the interrogatory responses of GACS in which GACS specifically stated that the ratchet system involved in this case continued to be the only tie-down system then approved for use.

REASONS FOR GRANTING THE WRIT

I. BECAUSE THE APPELLATE COURT REVERSED THE VERDICT AWARDING PUNITIVE DAMAGES BY ANALYZING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE MOVING PARTY, DISREGARDING THE JURY'S FACTUAL DETERMINATION THAT PLAINTIFFS PROVED BY CLEAR AND

CONVINCING EVIDENCE PUNITIVE DAMAGES WERE WARRANTED AND BY SUBSTITUTING ITS RULING FOR THE JURY'S RULING AND THE DISTRICT COURT'S RULING, THIS HONORABLE COURT SHOULD ADDRESS THE APPROPRIATE STANDARD OF CONSTITUTIONAL REVIEW IN CASES HANDED DOWN AFTER *COOPER INDUSTRIES, INC., V LEATHERMAN TOOL GROUP, INC.*

II. BECAUSE THE TRIAL COURT DISREGARDED PLAINTIFFS' EVIDENCE SUBMITTED IN OPPOSITION TO GM'S MOTION FOR SUMMARY JUDGMENT, GRANTED SAID MOTION YET ALLOWED THE REMAINING DEFENDANT TO BLAME GM AT TRIAL CONSTITUTIONAL RIGHTS OF THE PLAINTIFFS WERE VIOLATED WARRANTING CONSIDERATION BY THIS COURT AS TO WHETHER SUCH IS CONSTITUTIONALLY PERMISSIBLE.

A. Reason I Analysis

In *Cooper Industries, Inc., v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), this Honorable Court determined that a de novo standard of review should be applied by an appellate court when determining the constitutionality of punitive damages awards when challenged as excessive. In *Cooper Industries*, this Honorable Court reiterated its rejection of the "heightened scrutiny" standard of review for punitive damages awards previously rejected in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993).

While punitive damages awards are subject to due process review, *Cooper Industries, supra.*, at 149 L.Ed. 688, punitive damages determinations should ordinarily be left to the discretion of the jury. *Day v. Woodworth*, 54 U.S. 363 (1852).

In *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) this court addressed a constitutional claim that a punitive damages award was excessive. The Court noted factors relevant to an analysis of a punitive damages award include an analysis of whether the Defendant's behavior related to personal safety versus purely economic harm. *Id.*

Here, Plaintiffs' evidence demonstrated a clear pattern of and Defendant's awareness of hundreds of injuries per year. The jury found this and other evidence compelling. Here the jury considered Defendant was told in 1979 its safer design would save hundreds of injuries per year but it did not heed this warning. Here the jury learned Defendant had been repeatedly told by its own experts, customers and test loaders that its design is unsafe. Defendant ignored these warnings as well.

The Appellate Court did not analyze the evidence in the light most favorable to the non-moving party as required. Instead, the Appellate Court, after exonerating GM from liability, allowed Defendant to avoid punitive damages by adopting Defendant's arguments that GM would not allow the safer design. The Appellate Court, in its de novo review, however, ignored the undisputed evidence that Defendant's expert reports, industry reports and recommendations by test load personnel were never shared with GM by GACS. Plaintiffs submit this review is not a de novo review unless that term means a review of the evidence in the light most favorable to defeating a punitive damages award. Such standard is, of course, unprecedented and constitutes a unique standard of extra scrutiny for federal courts sitting in Missouri. The standard does not apply in Missouri state courts where a clear and convincing

standard is applied with no heightened scrutiny on appeal. Because Plaintiffs' claim was removed to federal court the heightened scrutiny standard was applied contrary to Plaintiffs' Equal Protection, Due Process and Jury Trial constitutional rights. There is and never should be a different standard for reviewing verdicts between state and federal courts sitting in the same state.

In the trial court the jury answered the Missouri Supreme Court approved jury instructions in the affirmative by indicating punitive damages were warranted. The jury assessed punitive damages in the amount of $200,000.00. Prior to the submission of the punitive damages claim to the jury Defendant moved for a directed verdict citing insufficient evidence to support a punitive damages award. The trial court denied the motion summarily after hearing the evidence. The Appellate Court, however, disagreed with the trial court and with the jury and vacated the punitive damages award.

Recently this Honorable Court determined that a Court of Appeals should apply a de novo standard when reviewing a district court's determination of the constitutionality of punitive damages awards. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S.Ct. 1678 (2001). In *Cooper Industries* this Honorable Court rendered it clear that the Court's rejection in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 113 S.Ct. 2711 (1993) of "heightened scrutiny" of punitive damages awards in still the law of the land. *TXO* at 509 U.S. 456; *Cooper Industries,* supra., at footnote 4. This Honorable Court explained in *Cooper Industries* that there is a legal and proper difference between the standard for reviewing a punitive damages

award as applied to a substantive and procedural standard. In *Cooper Industries* this Honorable Court reiterated that the role of the trial judge is to determine whether the jury's verdict is within the confines of state law, and to determine, by reference to the federal standards under Rule 59 whether a new trial or remittitur should be ordered. *Cooper Industries*, supra., at 121 S.Ct. 1684. The Court further reiterated its prior holdings to reestablish that if no constitutional issue is raised, the role of the Appellate court, at least in the federal system, is merely to review the trial court's determination under an abuse of discretion standard. *Id.* Similarly the Court reiterated that the actual findings made by district courts in conducting an excessiveness inquiry must be accepted unless clearly erroneous but the question whether the finding is constitutionally excessive calls for the application of a constitutional standard to the facts of a particular case, and in this context, and only in this context, is a de novo review of that question appropriate. *Id.* There was no constitutional excessive issue presented yet a de novo review was undertaken by the Appellate Court.

In the present action the trial court determined ample evidence had been presented at trial to justify submission of the punitive damages claim to the jury. When presented with the question, the jury awarded punitive damages. In post-trial motions the trial court once again rejected Defendant's argument that the evidence was insufficient to support a punitive damages award. The Appellate court, however, disagreed with the two decisions of the trial court and with the determination of the 8 members of the jury.

In the Court of Appeals the punitive damages award was vacated four months after this Honorable Court's

decision in *Cooper Industries* yet the Eighth Circuit apparently misconstrued the instructions and teachings of *Cooper Industries*. The Appellate Court based its decision on an analysis under Missouri law which requires a showing of complete indifference or conscious disregard for the safety of others in order to justify the imposition of punitive damages. No constitutional excessive basis for vacating the punitive damages judgment was cited by the Court of Appeals. As such, pursuant to *Cooper Industries*, *supra.*, at 121 S.Ct. 1685, the factual findings by the district court and by the jury must be accepted unless clearly erroneous. If, and only if, a constitutional issue is raised regarding the excessiveness of the award is the de novo review standard applicable. *Id.*

The Court of Appeals acted as a new finder of fact and reviewed the evidence de novo. This de novo review conflicted with this Honorable Court's teachings in *Cooper Industries* and cases cited therein. What's more problematic is that the de novo review by the Court of Appeals was one in which the Court of Appeals reviewed the evidence in the light most favorable to the non-moving party.

A brief analysis of the Appellate Court's opinion clearly establishes that the limited facts analyzed were not reviewed in the light most favorable to the Petitioner and that the facts set forth in the Appellate Court's decision are simply wrong. Page limitations prevent a thorough analysis but a few examples are in order.

The Appellate Court cited as a fact in its de novo review the attempt by the Defendant to develop alternative vehicle securement systems that did not require

excessive force including the quick release ratchet. The Appellate Court stated that Defendant did not implement those other designs for "various reasons" but the "fact that it worked to design a safer system belies the level of reckless indifference or conscious disregard for the safety of others necessary to support an award of punitive damages." Petitioner's evidence with regard to the alternative designs was clear that Defendant made a half-hearted attempt at creating safer alternative designs but did not utilize the safer designs because its sister corporation, its main customer, might lose income through a decreased trailer payload with the safer designs. Petitioner presented evidence that the Defendant's officers and directors received yearly bonuses based on the overall profits of Defendant and its sister corporations thereby providing Defendant with financial incentive to forego and withhold the alternative safer designs. Petitioner's evidence established that in 1979 Defendant developed the quick release alternative safer design. Petitioner's evidence was that Petitioner's injury would not occurred in 1993 if the quick release ratchet had been installed on Petitioner's trailer. Petitioner proved that in 1979 Defendant was specifically and expressly told by the safety director for Plaintiff's employer that the use of the newly developed quick release ratchet would save hundreds of injuries per year. Petitioner submits that the Appellate Court's factual determination that conscious disregard for safety was not shown is simply wrong and can only be supported if the evidence was viewed in the light most favorable to the Defendant.

Further, in addition to the failure by the Defendant to develop and/or employ the use of the alternative safer designs, Plaintiff's evidence established that the Defen-

dant actually withheld the existence of alternative safer designs from others in the industry. Each member of the jury and the trial judge was satisfied that the Plaintiff had shown by clear and convincing evidence the Defendant was guilty of complete indifference to or conscious disregard for the safety of others but the Appellate Court in its review of the evidence in the light most favorable to the Defendant disagreed.

The Appellate Court acknowledged the evidence established Defendant was aware of hundreds of injuries from using the ratchet tie down systems per year. The Appellate Court analyzed and assigned a 10% chance of being injured in a given year as a "number game" which "by itself" did not establish GACS was aware of an unreasonable danger to the driver. Petitioner submits that GACS' awareness and GACS' knowledge are clearly questions of fact and the attempt by the Appellate Court to assign such factual determinations with labels such as "number games" does not overcome the teachings of this Honorable Court with regard to the proper analysis.

In addition to an improper weighing of the evidence, Plaintiffs respectfully submit the Appellate Court also misapplied the law. Indeed the Appellate Court relied upon its own 1993 decision in reaching its conclusion that under Missouri law the safety of a product "must" be weighed against its utility. Since that time, however, the Missouri Supreme Court has rendered it clear that such is not a proper test under Missouri law. *Rodriguez v. Suzuki Motor Corp.*, 995 S.W.2d 47, 65 (Mo.banc 1999) ("this Court again declines the invitation to adopt the reasonable alternative design-risk-utility theory.").

Based upon the above, it is clear that the decision by the Appellate Court vacating the punitive damages award was contrary to the teachings by this Honorable Court, improperly engaged in a de novo review of factual determinations, analyzed the evidence improperly in its de novo review and applied the wrong legal standard under Missouri law.

Petitioner's evidence established that he suffered a career ending injury owing to a proven defective design. The Appellate court, by substituting its factually determinations for those of the jury, deprived the Plaintiff of his right to Trial by Jury. By applying improper legal standards the Appellate Court deprived the Petitioner of his right to Due Process under the law and Equal Protection.

B. Reason II Analysis

If this Court determines that the Petitioners' Writ of Certiorari should be granted, the Court must determine whether it is constitutionally incorrect for a Court to determine that an entity that controls a product design may escape liability for proven defects in the design yet the other Defendant-manufacturer is allowed to blame the dismissed Defendant at trial for regulating the design. The decisions by the lower courts granted and affirmed the summary judgment motion in favor of the non-manufacturer on the basis of lack of duty. But the remaining Defendant was permitted to blame the non-manufacturer at trial for regulating the design. This is in conflict with Petitioners' rights to a trial by jury and Due Process. Moreover, the bigger impact is the effect to product users who effectively are left without a remedy in situations where one company designs a product in compliance with another company's specifi-

cations.

By granting GM's summary judgment motion here the lower courts engaged in a weighing of the evidence. Petitioners submitted ample evidence in the summary judgment proceeding including the testimony of the co-Defendant, GACS. The trial court determined under F.R.Civ.P. Rule 56(c) said evidence was insufficient to allow the claim against GM to proceed to trial but then allowed the remaining Defendants to present essentially the same evidence at trial to establish GM's control or regulation of the product design.

A summary judgment motion is appropriate when there is no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 437 U.S. 242, 252, 106 S.Ct. 2505 (1986). A dispute is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Id.* A fact is "material" if a dispute over it might affect the outcome of the suit under the governing law. *Id.*

The Petitioners' case against GM should have never been disposed of upon a summary judgment motion. Petitioners, by way of deposition, affidavits and other competent evidence, presented a substantial amount of evidence to prove his claim. The Petitioners proved product defect ultimately.

Since the summary judgment was improperly granted in favor of GM, the Petitioners' constitutional right to a jury trial was violated. See *Page v. Work*, 290 F.2d 323, 334 (9th Cir. 1961), *cert. denied*, 368 U.S. 875 (1961). The lower court's allowance by the remaining Defendant, GACS, to then blame GM at trial violated Petitioners' Due Process rights. The jury trial is not merely a

procedural device, but, a fundamental right and an essential element of self government which the drafters of the Bill of Rights sought to preserve. To safeguard that right from judicial usurpation, the Seventh Amendment prohibits federal courts from taking away the role of the jury. Consistent with the textual mandate of the federal Constitution's Seventh Amendment that this right to a jury trial be preserved in suits "at common law," this Honorable Court, in interpreting the Seventh Amendment, (1) asks whether the court is dealing with a cause of action that either was tried at law at the time of the founding fathers or is at least analogous to one that was; and (2) if the action in question belongs in the law category, then asks whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it then existed. *City of Monterey v. Delmonte Dunes*, 526 U.S. 687, 119 S.Ct. 1624 (1999); *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376, 134 L.Ed.2d 577, 116 S.Ct. 1384 (1995). In order to preserve the right to a trial by jury the Petitioners' entire case should have been heard by a jury.

Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to jury trial should be scrutinized with the utmost care. *Dimick v. Schiedt*, 239 U.S. 474, 486 (1935); *Chauffeurs, Teamsters and Helpers v. Terry*, 494 U.S. 558 (1990). So vital is this great constitutional right that "it is only in exceptional cases and for specific causes that a party may be deprived of it." *Grand Chute v. Winegar*, 82 U.S. 373, 375 (1872); *Jacob v. New York City*, 315 U.S. 752, 752-753 (1942). "The right to jury trial in civil cases at common law is a . . . right so

fundamental and sacred to the citizens that it should be zealously guarded by the courts." *Id.*

This Honorable Court has been highly protective of the jury's role: "Credibility determinations, the weighing of the evidence, and the drawing of inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment . . . the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson, supra.* at 255. It would be an undue invasion of the jury's historic function for a court to weigh the conflicting evidence and judge the credibility of witnesses. *Id.* The lower court granted GM's motion based upon an erroneous weighing of the evidence. A genuine issue of material fact existed as to whether GM participated in the design of the product. The lower courts simply ignored Petitioners' direct evidence and concluded, based upon the purported lack of evidence, that GM owned no duty. Petitioners submit the finding of no duty was premised upon a disregard of Petitioners' clear evidence and such finding cannot be allowed to stand.

Multiple decisions from various state Supreme Courts have addressed the constitutionality of the so-called "empty chair" defense in the context of situations where the non-party was never sued but sought by the Defendant to be blamed at trial. Courts holding such improper under state constitutional or statutory provisions include *Bell v. Glock, Inc.*, 92 F.Supp.2d 1067 (D. Mt. 2000); *Wethington v. Wellington*, 781 F.Supp.2d 1379 (S.D. In. 1991); *Wall v. Cherrydale Farms, Inc.*, 9 F.Supp. 784 (E.D. Mi. 1998); *Plumb v. Fourth Judicial District* Court, 279 Mont. 363, 927 P.2d 1011 (Mont.Sup.Ct. 1996); *State ex rel Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 715 N.E.2d

1062 (Ohio Sup.Ct. 1999); *Richards v. Owens-Illinois, Inc.*, 14 Cal.4th 985, 928 P.2d 1181 (Cal.Sup.Ct. 1997); and *Best v. Taylor Machine Works*, 179 Ill.2d 367, 89 N.E.2d 1057 (Ill.Sup.Ct. 1997). Many of these decisions hold the empty chair defense violative of state constitutional provisions but no case could be found where this Honorable Court has analyzed this significant issue under United States Constitutional provisions. Here, the lower courts allowed for trial tactics which are more egregious than those declared unconstitutional by many state courts. Here Plaintiffs actually sued GM but it escaped liability on summary judgment. The allowance by the lower courts to permit the remaining Defendant to blame GM at trial smacks of constitutional violations. Accordingly, Plaintiff respectfully request review by this Honorable Court.

This Honorable Court must grant this Petition for Certiorari so that it may clarify the standard for a motion for summary judgment where a lower court weighs or disregards evidence, utilizes such as a basis for dismissing one Defendant and then allows the remaining Defendant to blame the dismissed Defendant at trial. Such legal inconsistency begs for redress by this Honorable Court.

CONCLUSION

The Eighth Circuit and the Western District Court of Missouri have placed a high burden of proof upon the Petitioners to overcome a summary judgment motion. The Court should grant *certiorari* to review this important matter, clarify the parties' burdens, order a proper remedy for the Petitioners, reverse the Eighth Circuit's and District Court's opinions, and order that the Petitioners have a constitutional right to jury trial on the claims against GM since there was an improper weighing or disregard of Petitioners' evidence. Additionally, the Court should grant *certiorari* to clarify and establish that under a de novo review of a punitive damages verdict, the Appellate Court may not view the evidence in the light most favorable to the movant.

RESPECTFULLY SUBMITTED,

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

00-1043

Robert Ford; Bobbie Sue Ford,
Appellees,

v.

GACS, Inc.,
Appellant.

00-1352

Robert Ford; Bobbie Sue Ford,
Appellants,

v.

GACS, Inc.; General Motors Corporation,
Appellees.

Appeals from the United States District Court for the Western District of Missouri.

Submitted: April 10, 2001
Filed: September 7, 2001

Before HANSEN and BYE, Circuit Judges, and MELLOY,[1] District Judge.

HANSEN, Circuit Judge.

GACS, Inc. (hereinafter "GACS") appeals from the district court's denial of its motion for judgment as a matter of law following a jury verdict awarding Robert Ford both compensatory and punitive damages on his

[1]The Honorable Michael J. Melloy, United States District Judge for the Northern District of Iowa, sitting by designation.

products liability and negligence claims for injuries he sustained while using a product designed by GACS. Robert Ford and Bobbie Sue Ford cross-appeal from the district court's grant of summary judgment in favor of General Motors Corporation (hereinafter "GM") related to the same incident. We affirm the jury's award of compensatory damages to Mr. Ford but we reverse the district court's denial of GACS's motion for judgment as a matter of law on the punitive damages. We also affirm the district court's grant of summary judgment to GM.

I.

These appeals arise from the use of a ratchet system used to tie down new automobiles to an automobile transport trailer during highway transport. Robert Ford was a truck driver who hauled new automobiles for his employer, Complete Auto Transit. He was injured while untying a one-ton pickup from his trailer. GACS designed and manufactured the ratchet system used by Mr. Ford when he was injured, and GACS sold the trailer on which it was mounted to his employer.

Understanding the mechanics of the ratchet tie-down system designed by GACS is critical to Ford's claims of negligence and product defect. Ford's trailer was equipped with a chain and ratchet system, a very manual-intensive process that is commonly used by automobile transporters. To secure a hauled vehicle to the trailer, the driver attaches the hooked end of a chain to a preformed slot on the vehicle's frame and the other end of the chain is affixed to the ratchet device's spool, which is mounted on the trailer. The ratchet is then rotated to tighten the chain around the spool, pulling the hauled vehicle down against the resistance offered by its own suspension system. As the ratchet is rotated,

a pawl clicks into place in the ratchet's gear-like teeth, which in turn prevents the spool from reversing rotation and the chain from loosening. The driver uses a "tie down bar," a steel rod about three feet long, which is inserted into holes around the outside of the ratchet, to gain the leverage needed to turn the spool sufficiently to tighten down the vehicle. Because the pawl clicks into place automatically as the spool is tamed, the driver is able to use both hands and both arms to exert force on the tie down bar to tie down the vehicle. A separate ratchet and chain device secures each corner of the transported vehicle.

A vehicle is "untied" by reversing the process. To loosen the chain, the driver pulls down on the tie down bar exerting enough countervailing force to take the pressure off the pawl so that he can flip the pawl out of the way and allow the ratchet to unwind and loosen the chain in short increments. The driver generally uses both arms and both hands to apply the force required on the tie down bar to further tighten the chain enough so as to free up the pawl. Once the driver has released the pressure against the pawl, however, he must use one hand to flip the pawl out of the way while maintaining the extra force necessary to hold the tie down bar in position with the other arm.

GM, as an automobile manufacturer, worked closely with others in the automobile transportation industry to continually develop and to improve the equipment used to haul its automobiles. GM organized the GM Haulaway Committee, consisting of carriers that regularly transported GM vehicles and trailer manufacturers, which, among other things, shared new ideas and concepts related to shipping automobiles. As early as

1979, studies concerning injuries to drivers during the tying and untying processes were reported at various GM Haulaway Committee meetings. GACS's president, Earl Lempke, attended many of the GM Haulaway Committee meetings at which driver injuries were discussed.

GACS developed a quick release ratchet in 1979 that allowed the driver to untie the vehicle without manually lifting the pawl out of the way, resulting in a quicker and safer procedure for untying vehicles. GACS did not equip the trailers that it manufactured with the quick release ratchet at that time, however, because GM did not approve of its carriers using the quick release ratchet because of potential damage to the vehicle being transported. GM required that equipment used to haul its new vehicles be approved by GM and comply with procedures outlined in GM's shipping manual. The manual explained the proper procedure for tying down vehicles to avoid damage to the vehicle. It did not address safety issues and GM was not involved in training any of the carriers' employees. GACS developed various alternatives to the traditional chain and ratchet system which would have eliminated the need for countervailing manual force to untie vehicles during the 1980s and early 1990s, none of which were approved by GM. GM finally approved of a quick release ratchet in 1994, after Mr. Ford was injured. GACS incorporated the quick release ratchet into its trailers soon after it was approved by GM.

Mr. Ford had 28 years of experience as an automobile hauler at the time of his injury. Ford's injury occurred on December 15, 1993, while he was untying a one-ton pickup from his load. Ford testified that he had overtightened that particular vehicle to meet the 13 feet 6

inch load height limitation for transport on Interstate highways, although he had been instructed by his employer to request a change in the load configuration rather than to overtighten a vehicle down to meet the load height requirement. Attempting to untie the truck, Ford pulled down on the tie down bar to slacken the pressure on the pawl, and as he removed one hand from the tie down bar to reach up and flip the pawl out of the way, he "felt a sudden snap or sudden release, and excruciating pain" in his shoulder. Jr. at 83.) Ford tore his rotator cuff and was never able to return to work as an automobile hauler.

Prior to trial, the district court granted GM's motion for summary judgment. The case proceeded to trial against GACS. The jury returned a verdict in favor of Ford on both of his claims, assessing his total compensatory damages at $150,000. The district court reduced the compensatory award to $105,000 based on the jury's apportionment of fault. The jury also awarded Ford $200,000 in punitive damages.

II. GACS's Appeal

Following the jury verdict, GACS moved for judgment as a matter of law, or alternatively for a new trial, which the district court denied. On appeal, GACS argues that the compensatory damages cannot stand as a matter of law under either the negligence claim or the products liability claim because any danger presented by the device was open and obvious. It argues that the punitive damages cannot stand because there was no evidence of evil motive. Finally, GACS argues that the district court erred in denying its motion for a new trial based on improper jury instructions related to Ford's duty to mitigate damages.

A. Products Liability

We review de novo the district court's denial of GACS's motion for judgment as a matter of law. "Judgment as a matter of law is proper only when there is a complete absence of probative facts to support the conclusion reached so that no reasonable juror could have found for the nonmoving party." *Foster v. Time Warner Entm't Co., L.P.*, 250 F.3d 1189, 1194 (8th Cir. 2001) (internal quotations and citations omitted). The parties agree that Missouri law controls this case, which reaches us by reason of the parties' diverse citizenship.

GACS argues that the alleged danger-which it defines as requiring excessive force to operate the ratchet-was open and obvious because Ford had used the ratchet and applied similar force thousands of times over his 28 years as an automobile hauler. GACS argues that the openness and obviousness of the danger precludes liability as a matter of law. In the context of a Missouri products liability claim, however, the openness and obviousness of a defect does not automatically preclude judgment. The Missouri legislature abolished contributory fault for products liability cases, replacing it with pure comparative fault. *See Miller v. Varily Corp.*, 922 S.W.2d 821, 826 (Mo. Ct. App. 1996) (discussing the effect of Missouri's adoption of comparative fault on products liability claims involving open and obvious dangers). The plaintiff s knowledge of a danger is one of the enumerated items of fault to be compared in a products liability case. *See* Mo. Rev. Stat. § 537.765(3)(3); *see also Miller*, 922 S.W.2d at 826 (holding that the open and obvious nature of a defect does not bar recovery but is appropriately considered in apportioning fault). Thus, under Missouri products liability law, the openness and

obviousness of any alleged design defect in the ratchet does not preclude recovery as a matter of law. *See Anderson v. F.J. Little Mach. Co..*, 68 F.3d 1113, 1117 & n.2 (8th Cir. 1995) (reversing summary judgment in a products liability case under Missouri law and noting that although the obviousness of a defect is material, it "stops far short of compelling judgment for the manufacturer, and indeed demonstrates that a fact finder must consider the issue").

GACS's argument that the ratchet was not unreasonably dangerous because the amount of force required to operate the ratchet was known to Ford relies on what is often termed the "consumer expectations" test for determining what is unreasonably dangerous. [2] The Missouri courts have repeatedly declined to adopt a test-the consumer expectations, risk-utility,[3] or any other-for determining what is unreasonably dangerous. Rather, what is unreasonably dangerous "needs no judicial definition" and is left as an ultimate fact question for the jury, to be decided by allowing the jury to apply "'their collective intelligence and experience to the broad evidentiary spectrum of facts and circumstances presented by the parties.'" *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 65 (Mo. 1999) (en banc) (quoting *Newman v. Ford Motor Co.*, 975 S.W.2d 147, 154 (Mo. 1998) (en

[2]A product is unreasonably dangerous under this theory only if it is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it." Restatement (Second) Torts,§ 402A cmt. i.

[3]Under the risk-utility test, numerous factors are considered in determining whether a reasonable alternative design would have reduced the foreseeable danger posed by the product such that omission of the alternative design renders the product not reasonably safe. *See* Restatement (Third) of Torts: Products Liability§ 2(b).

banc)); *see also Drabik v. Stanley-Bostitch, Inc.*, 997 F.2d 496, 506 (8th Cir. 1993) (holding that plaintiffs knowledge of danger posed by nail gun did not preclude jury verdict on products liability claim under Missouri law); *Miller*, 922 S.W.2d at 825-26 (affirming jury verdict for plaintiff on products liability claim based on defendant's failure to equip tractor with a roll over protection system). Missouri courts prefer to allow "litigants to argue that the utility of a design outweighs its risks, or that consumer expectations were violated, or any other theory of unreasonable dangerousness supported by the evidence...." *Rodriguez*, 996 S.W. 2d at 65 (quoting *Newman,* 975 S.W.2d at 154).

Ford offered evidence of GACS's awareness of safer alternatives to the traditional manual ratchet system, particularly the quick release ratchet that GACS developed in 1979 long before Ford's injury. There was also evidence that injuries from the force required to tie and untie vehicles were a concern in the industry and that the quick release ratchet would eliminate the high force levels needed to untie a vehicle, the same activity Ford was performing when he was injured. GACS offered evidence of Ford's extensive experience tying and untying vehicles and his knowledge of the risks associated with using the ratchet. Ford's expert opined that the levels of force required to properly tie down a vehicle were unreasonably dangerous, while GACS's expert testified that they were not. The jury instruction tracked the statute, instructing the jury that the ratchet system had to be "in a defective condition unreasonably dangerous when put to a reasonably anticipated use" before GACS could be held strictly liable. (J.A. at 1235.) The instruction was broad enough to allow the jury to apply either theory argued by the parties-consumer expecta-

tions as argued by GACS or risk-utility as argued by Ford. Although both parties offered evidence to refute the other's theory, the jury was apparently persuaded by Ford's argument of the evidence. On these facts, we cannot say that no reasonable juror could have found for Ford. The district court correctly rejected GACS's motion for judgment as a matter of law on Ford's products liability claim.

The jury returned a special verdict, finding GACS liable under both the negligence and the products liability theories. It assessed GACS's fault at 70% and Ford's fault at 30% under both theories. The jury valued Ford's compensatory damages at $150,000, which the district court apportioned based on the jury's fault allocations. Because we hold that the products liability claim was properly submitted to the jury and the verdict is supported by the evidence, we need not reach GACS's argument concerning the negligence claim. The products liability finding supports the damages award, regardless of the outcome on, the negligence claim.

B. Punitive Damages

"The test for punitive damages in Missouri is a strict one." *Drabik*, 997 F.2d at 510. Punitive damages may be awarded in a negligence case only "if the defendant knew or had reason to know a high degree of probability existed that the action would result in injury." *Letz v. Turbomeca Engine Corp.*, 975 S.W.2d 155, 164 (Mo. Ct. App. 1997) (opinion adopted & reinstated after retransfer Sept. 29, 1998). Before punitive damages are warranted in a products liability case, the defendant must have placed an unreasonably dangerous product in commerce with actual knowledge of its defect. *Id.* at 164-65; *see also Drabik*, 997 F.2d at 510. Punitive damages are

appropriate under either theory of recovery only if the defendant "showed a complete indifference to or conscious disregard for the safety of others." *Letz*, 975 S.W.2d at 165. Ultimately, the defendant "must have acted with some degree of wantonness or bad motive." *Drabik*, 997 F.2d at 510.

GACS was aware that the level of force used on the ratchets resulted in some injuries to drivers. GACS worked to reduce those injuries by developing alternative systems for securing automobiles that did not require excessive force to operate, including the quick release ratchet. Though it did not implement those other designs for various reasons, the fact that it worked to design a safer system belies the level of reckless indifference or conscious disregard for the safety of others necessary to support an award of punitive damages. *See id.*

A manufacturer does not necessarily act with the requisite wantonness to support punitive damages by continuing to manufacture a product with the knowledge of some injuries. " [T] he defendant must be aware of unreasonable danger, not just any danger." *Id.* In 1990, Complete Auto Transit employees reported 494 total injuries from tying or untying automobiles, 255 of which resulted in lost time. Employees reported a total of 277 injuries in 1991, of which 248 resulted in lost time. GACS's president testified that these numbers, which resulted in an injury.001% of the times the ratchet was used, led him to believe that the ratchet was not inherently dangerous. Although Ford countered that based on these same numbers, an individual driver had a 10% chance of being injured in a given year, these number games do not establish that GACS was aware of an unreasonable danger to the driver.

The safety of a product must also be weighed against its utility. *See id.* at 511 (noting that many products, such as knives or nail guns, have a certain degree of danger that is outweighed by the product's utility). An acceptable automobile tie down system must keep the automobiles from coming loose from the trailer and endangering other travelers as well as secure the automobiles without damaging them. GACS manufactured its trailers primarily to transport GM automobiles. At the time of Ford's injury, the chain and ratchet system, which was standard in the industry, was the only method for securing automobiles that GM had approved. We do not suggest that a manufacturer may ignore safety concerns based on customer demand, but it does go to the wantonness required for a punitive damages award. *See id.* at 510 (noting that the fact that the product design was the standard in the industry was "relevant to show that [the defendant] was not willfully indifferent"). On these facts, there simply is not the evidence of evil motive or reckless disregard by GACS necessary to support a punitive damages award. *See, e.g., Lopez v. Three Rivers Elec. Co-op., Inc.*, 26 S.W.3d 151, 160 (Mo. 2000) (en banc) (comparing the defendant's conduct to the Missouri Supreme Court's classic example of a person firing a rifle into a moving passenger train as the level of knowledge of a high degree of probability of injury required to support punitive damages). GACS is entitled to judgment as a matter of law on the punitive damages claim.

C. Jury Instructions on Mitigation

GACS's final point on appeal is that the district court erred in failing to submit two proposed jury instructions involving Ford's failure to mitigate his damages by

seeking other employment. We review the district court's refusal to submit a requested instruction to the jury for abuse of discretion. *St. Jude Med., Inc. v. Lifecare Int'l. Inc.*, 250 F.3d 587, 594 (8th Cir. 2001). "[R]eview is limited to whether the instructions, viewed on the whole, fairly and adequately represent the evidence and applicable law in light of the issues presented to the jury in a particular case." *Id.* (internal quotations and citations omitted). Because this is a diversity case, the substance of the jury instructions must fairly and adequately represent Missouri law. *Wheeling Pittsburgh Steel Corp. v. Beelman River Terminals, Inc.*, 254 F.3d 706, 711 (8th Cir. 2001).

Under Missouri law, comparative fault encompasses a plaintiffs unreasonable failure to mitigate his damages. *See* Mo. Rev. Stat.§ 537.765.3(6); *Love v. Park Lane Med. Ctr.*, 737 S.W.2d 720, 724 (Mo. 1987) (en banc). "To be charged to the jury, an issue submitted in an instruction must be supported by substantial evidence from which the jury reasonably could find such issue." *Kauzlarich v. Atchison, Topeka, & Santa Fe Ry. Co.*, 910 S.W.2d. 254, 258 (Mo. 1995) (en banc) (internal quotations and citations omitted). Because mitigation of damages is an affirmative defense, GACS bears the burden of establishing that Ford could have lessened his damages. *Id.* at 256.

Following Ford's surgery for his torn rotator cuff, Ford's doctor released him to work with restrictions on lifting, which precluded him from returning to his prior position as an automobile hauler. Ford's employer did not offer him any other type of work. Ford ultimately received Social Security disability benefits, workers' compensation, and pension disability benefits following

his injury. Ford testified that he did not seek alternative work because he would not be able to find a job that paid as much as he was receiving from these sources, which would have been terminated if he had taken another job. A vocational expert met with Ford in 1999. He reviewed Ford's medical records from the time of the accident and administered various tests to Ford. He opined that given Ford's shoulder impairment, preexisting breathing problems, advanced age, limited tenth grade education, prior extensive work history exclusively as an automobile hauler, and the restrictions Ford's doctor placed on his lifting, Ford was unemployable, both in 1999 when the expert met with Ford and following the injury. GACS countered only with evidence that Ford did not look for another job and that his doctor released him to some kind of work consistent with the lifting restrictions. It offered no evidence about the job market or any jobs Ford might be qualified to perform.

To meet its burden of proof, GACS "must show that [Ford] had an opportunity to mitigate and the reasonable prospective consequences." *Bus. Men's Assur. Co. of Am. v. Graham*, 891 S.W.2d 438, 448 (Mo. Ct. App. 1994). "It is not enough for the [defendant] to prove that the plaintiff made no effort to get other employment, but he must go further and prove that such employment could have been secured." *Stewart v. Bd. of Educ. of Ritenour Consol. Sch. Dist., R-3*, 630 S.W.2d 130, 134 (Mo. Ct. App. 1982) (internal quotations omitted). GACS failed to meet its burden of establishing its affirmative defense of failure to mitigate damages. As such, the district court did not abuse its discretion in refusing the proffered instructions. *Cf. Kauzlarich*, 910 S.W.2d at 258 (holding that the trial court erred in refusing a mitigation of damages instruction where defendant

offered expert testimony of job opportunities in the market place, considering plaintiff's age, education, work experience, and physical limitations; plaintiff had attended over two years of college and worked at a wide variety of jobs; and plaintiff rejected former employer's offer to retrain).

III. Fords' Cross-Appeal

The Fords cross-appeal the district court's grant of summary judgment in favor of GM. The Fords contend that summary judgment is inappropriate because a fact issue exists regarding whether GM prohibited use of the quick release ratchet. The Fords also argue that an entity that influences the design of a product through its economic relationship with the manufacturer may be held liable for both negligence and products liability.

We review the district court's grant of summary judgment de novo. "Summary judgment is proper where, viewing the evidence in the light most favorable to the nonmoving party, there are no genuine issues of material fact in dispute." *Larsen v. Mayo Med. Ctr.*, 218 F.3d 863, 866 (8th Cir.), *cert. denied*, 121 S. Ct. 625 (2000).

A. Products Liability

Missouri has adopted section 402A of the Second Restatement of Torts as its products liability jurisprudence, as codified at section 537.760 of the Missouri Revised Statutes. The common thread among Missouri products liability cases is that an entity must have "'plac[ed] a defective product in the stream of commerce.'" *Bailey v. Innovative Mgmt. & Inv., Inc.*, 916 S.W.2d 805, 807-08 (Mo. Ct. App. 1995) (quoting *Gunderson v. Sani-Kem Corp.*, 674 S.W.2d 665, 668 (Mo.

Ct. App. 1984) and holding that construction company which loaned a nail gun to its employee was not strictly liable when friend of employee was injured by nail gun because it did not place the nail gun into the stream of commerce; rather, it engaged in an isolated, noncommercial transaction by loaning the gun to its employee); *Meschik v. Mid-Am. Pipeline Co.*, 812 S.W.2d 861, 863 (Mo. Ct. App. 1991) (holding that by adding odorant to propane gas, common carrier placed defective propane gas into stream of commerce because odorant was the cause of the claimed defect); *see also* Mo. Rev. Stat.§ 537.760(1) (requiring as the first element of a products liability claim that the plaintiff establish that "[t]he defendant, wherever situated in the chain of commerce, transferred a product in the course of his business"). "'[I]t is the defendant's *participatory connection, for his personal profit or other benefit*, with the injury-producing product and *with the enterprise that created consumer demand for and reliance upon the product* which calls for the imposition of strict liability . . . .'" *Bailey*, 916 S.W.2d at 807-08 (quoting *Gunderson*, 674 S.W.2d at 668).

Some courts have extended products liability to entities that are "an integral part of the composite business enterprise which was responsible for placing [the defective product] in the stream of commerce." *Taylor v. Gen. Motors, Inc.*, 537 F. Supp. 949, 954 (E.D. Ky. 1982) (internal quotations omitted) (applying Kentucky law). The court in *Taylor* held that General Motors was a proper party to be held strictly liable for a defective fan manufactured by another company for General Motors because "G.M. exercised strict control over the design and testing of the product, particularly with regard to the critical factor of the durability standards for resis-

tance to metal fatigue [which was the alleged defect]." *Id.* Similarly, the Arizona Supreme Court held Goodyear Tire & Rubber Company (hereinafter "Goodyear") strictly liable for a defective tire manufactured by its European subsidiary, Goodyear Tire & Rubber (Great Britain), Ltd., because Goodyear had a licensing agreement with the subsidiary, which required the subsidiary to manufacture the tires in accordance with Goodyear's formulas, specifications, and directions. *Torres v. Goodyear Tire & Rubber Co., Inc.*, 786 P.2d 939, 942 (Ariz. 1990). The court found strict liability to be appropriate because "Goodyear participated significantly in the design, manufacture, promotion, and sale that resulted in the product reaching the consumer." *Id.* at 945.

GM cannot be said to have placed the ratchet system into the stream of commerce in this case. GM is the customer of the hauler, who in turn is the customer of the alleged defective product's designer and manufacturer. True, GM approved of the allegedly defective ratchet system for use in transporting its vehicles and, for purposes of summary judgment, we presume disapproved of the quick release ratchet, which would have been safer for automobile haulers. GM collaborated with trailer manufacturers and carriers through the GM Haulaway Committee to exchange ideas and discuss proper methods for hauling GM automobiles. However, GM did so as a customer. It did not specify the design to be used, but merely accepted or rejected the systems developed and offered by the designers. When GM was made aware of injuries associated with use of the ratchet system, it asked the designers to develop a better ratchet. It did not attempt to design one itself. The Fords have not offered any evidence that GM was involved in the actual design, manufacture, or market-

ing of the ratchet, other than to accept or reject a particular tie down system consistent with its needs.

We have noted that Missouri courts "have confined the reach of [the products liability] doctrine to distributors either by sale, lease, or bailment." *Wright v. Newman*, 735 F.2d 1073, 1079 (8th Cir. 1984). We have not found any Missouri cases, nor have the parties directed us to any, that have extended products liability beyond those entities. Even if we believed that the Missouri judiciary would extend its products liability doctrine to cover entities that were "an integral part of the composite business enterprise which was responsible for placing [the defective product] in the stream of commerce," *Taylor* , 537 F. Supp. at 954, GM does not fit that description in this case. GM's status as a dominant customer of the automobile carriers may factor into such a discussion, but the remaining facts do not support such a conclusion. We decline to extend the reach of Missouri's products liability law to the facts of this case.

B. Negligence

To establish a claim for negligence, Ford must prove that GM "had a duty to protect [him] from injury, [GM] failed to perform that duty, and [GM's] failure proximately caused injury to [Ford.]" *Lopez*, 26 S.W.3d at 155. "Whether a duty exists is purely a question of law." *Id.*

> 'The common denominator that must be present is the existence of a relationship between the plaintiff and defendant that the law recognizes as the basis of a duty of care.' [*Bunker v. Ass'n of Mo. Elec. Coops.*, 839 S.W.2d 608, 611 (Mo. Ct. App. 1992).] In making this determination, [Missouri courts] refer

> 'to the body of statutes, rules, principles and precedents which make up the law.' *Kopoian v. George W. Miller & Co.*. 901 S.W.2d 63, 68 (Mo. Ct. App. 1995).

Parra v. Bldg. Erection Servs., 982 S.W.2d 278, 283 (Mo. Ct. App. 1998). Where no duty is indicated by Missouri statute, case law, or otherwise, a fundamental prerequisite to establishing negligence is absent. *See Horstmyer v. Black & Decker*, (U.S.), Inc., 151 F.3d 765, 773 (8th Cir. 1998) (affirming the dismissal of a negligence claim where Missouri law did not recognized a duty to recall an allegedly defective product under the circumstances of the case despite plaintiffs claim that the harm sustained was foreseeable).

Ford argues generally that his injury was foreseeable to GM because GM continued to reject safer tie down systems, despite its awareness of driver injuries. Ford falls to articulate a basis in Missouri law for any duty owed by GM to the employee of the company GM hired to transport its automobiles. As we discussed above, GM did not manufacture or design the ratchet system. It did not attempt to specify the design of the system, but left that to the manufacturers' designers. Nor did it train the drivers who utilized the allegedly defective ratchet system. It merely rejected certain tie down systems as not meeting its needs. We have found no Missouri cases that have imposed a duty on an entity that influences the design of a product by its rejection of proffered alternatives. Under these facts, we cannot say "that the Missouri Supreme Court would create a common law duty" on GM's part to protect Ford from injuries sustained while using the ratchet system. *Id.* The district court correctly dismissed GM from the suit.

IV.

For the foregoing reasons, we affirm the district court's denial of GACS's motion for judgment as a matter of law pertaining to the compensatory damages, but we reverse its denial of the motion as it relates to punitive damages. We affirm the district court's grant of summary judgment in favor of GM.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 00-1043
Robert Ford; Bobbie Sue Ford,
Appellees,

VS.

GACS, Inc.,
Appellant.

No. 00-1352

Robert Ford; Bobbie Sue Ford,
Appellants,

VS.

GACS, Inc.; General Motors Corporation,
Appellees.

Order Denying Petition for
Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. Judge McMillian, Judge Loken, and Morris Sheppard Arnold did not participate in the consideration or decision of this case.

The petition for rehearing by the panel is also denied. (5128-010199)

October 16, 2001

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

ROBERT FORD and BOBBIE SUE FORD,
Plaintiffs,

v.

GACS, INC., et al.,
Defendants.

No. 98-0489-CV-W-2

ORDER

Before the Court is defendant General Motors Corporation's motion for summary judgment on the grounds that it is not among the class of persons or entities which may be held strictly liable or negligent for the design of the tie-down system that allegedly caused plaintiffs' injuries. Plaintiffs oppose defendant's motion. For the reasons discussed herein, the Court shall grant summary judgment.

1. Factual Statement[1]

In December 1993, plaintiff Robert Ford worked as a driver of an automobile trailer and allegedly injured his shoulder while using a conventional, manually-operated ratchet system to untie a vehicle from the trailer.

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[1]The Court finds plaintiffs, statement of facts to be highly unsatisfactory. Generally, plaintiffs fail to controvert the specific facts stated by defendant and include numerous unrelated and irrelevant facts in their responses. Furthermore, plaintiffs often cite to documents which are not identified, much less certified with a proper foundation, in support of their contentions. Nevertheless, the Court shall consider the essence of plaintiffs, assertions.

Plaintiffs claim that the non-quickrelease tie-down system on the trailer is defective because it requires individuals to exert excessive levels of force and is subject to sudden releases.

When he was injured, plaintiff was working for Complete Auto Transit, which hauled vehicles manufactured by defendant. The tractor pulling the trailer at issue was manufactured by defendant, but defendant did not manufacture or design the trailer or the tie-down system installed on the trailer. Defendant's vehicles are designed with tie-down slots in the frames for use with ratchet tie-down systems, although plaintiffs have presented no evidence that such slots could not have been used in conjunction with alternative tie-down systems.

Defendant provided carriers, such as Complete Auto Transit, with a shipping manual describing the procedure for tying down vehicles in a manner which would prevent damage during transport. The manual does not address steps drivers should take to avoid injury during the tie-down process, and plaintiff was trained by his employers regarding the proper method of securing vehicles. on the day of his injury, plaintiff overtightened the vehicles on his trailer, contrary to instructions provided by defendant.

Plaintiff alleges that defendant participated in the design and testing of the trailers used to transport its vehicles. The evidence indicates that defendant participated in creating *Electrical Industry Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986), the Court emphasized that the party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts" in order to establish a

genuine issue of fact sufficient to warrant trial.

In reviewing a motion for summary judgment, the court must scrutinize the evidence in the light most favorable to the non-moving party, according the non-moving party the benefit of every factual inference and resolving all doubts as to the facts or existence of any material fact against the moving party. *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 179-80 (W.D. Mo. 1985). Additionally, the court should keep in mind that summary judgment is encouraged in appropriate cases:

> Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the federal rules as a whole, which are designed "to secure the just, speedy, and inexpensive determination of every action."

Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (citation omitted) *Accord City of Mount Pleasant v. Assoc. Electric Coop., Inc.*, 838 F.2d 268 (8th Cir. 1988).

III. Discussion

Plaintiffs have alleged both strict liability and negligence theories against defendant in the design of the tie-down system.[2] Missouri law applies to plaintiffs' claims. "The theory of strict tort liability holds 'one who sells' a defective product unreasonably dangerous to the user liable for resulting injury." *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241, 244 (Mo. 1984). Although Missouri courts do not limit application of this strict liability theory to sellers alone, "plaintiff must establish some causal

[2] Plaintiffs have abandoned their breach of warranty claims.

relationship between the defendant and the injury-producing agent." *Id.*

In Missouri, liability has attached to lessors of defective products, as well as to other participants in the chain of commerce. *See, e.g. Gabbard v. Stephenson's Orchard, Inc.*, 565 S.W.2d 753 (Mo. App. 1978). However, plaintiffs have cited no Missouri case which has held a person or entity outside the chain of commerce of the defective product strictly liable for injuries caused by the product. "The focus is thus on whether the commercial entity is in the chain of distribution that provides a product to the consumer." *Wright v. Newman*, 735 F.2d 1073, 1078 (Mo. App. 1984) (refusing to find finance company of defective pickup strictly liable). *See also Racer v. Utterman,* 629 S.W.2d 387, 398-99 (Mo. App. 1981) (refusing to find hospital user of defective product strictly liable). In fact, few courts have ever imposed strict liability on entities in positions similar to that of defendant. *See Products Liability of endorser. trade association, certifier, or similar party who expresses approval of product,* 1 A.L.R. 5th 431 §§ 2, 3 (1992).

The Court concludes that it would be an improper extension of Missouri law to hold defendant strictly liable for injuries caused by the tie-down system it did not manufacture or design simply because it approved the use of the system to transport its vehicles. Therefore, the Court shall grant defendant summary judgment on plaintiffs, strict liability claims.

In order to recover under a theory of negligence, plaintiffs must establish the existence of a duty of care. *See Claxton v. City of Rolla*, 900 S.W.2d 635, 636 (Mo. App. 1995). The existence of a duty is a matter of law for

the Court. *Bunker v. Association of Missouri Electric Cooperatives*, 839 S.W.2d 608, 611 (Mo. App. 1992). - "The common denominator that must be present is the existence of a relationship between the plaintiff and defendant that the law recognizes as the basis of a duty of care." *Id.*

Plaintiffs have not specifically argued any theory by which defendant owed them a duty, although they do mention situations where non-manufacturers have been held liable for negligence. without demonstrating their application in this case, plaintiffs note that defendants have been held liable for promulgating standards, assuming a duty, and certifying, testing, and approving a product.

In the present case, plaintiffs have not produced any evidence indicating that defendants assumed a duty of care owed to persons such as plaintiffs. Although defendant may have participated in the approval process of tie-down systems used to secure its vehicles, the reason for this participation was concern about damage to its vehicles, not to ensure the safety of users of the system. Defendant cannot be said to have assumed a duty to protect such users simply by seeking to protect its own property interests. - [M]erely assisting another in the performance of his duty to a third person is not enough to trigger liability. Rather, one must intend to completely *subsume* or *supplant* the duty of the other party in order to incur liability. . . . it is not enough to intend to *supplement* the duty of the other party." *Plant v. Union Electric Co.*, 899 S.W.2d 129, 131 (Mo. App. 1995) (emphasis in original) . By participating in the design process to ensure that the product met its needs, defendant did not replace the manufacturer's duty to design and produce a safe product.

Furthermore, plaintiffs have not demonstrated the existence of any case in Missouri holding that one who certifies, approves, or tests a product owes a duty of care to the consumer of the product. in fact, the only reference to a Missouri case in the annotation cited by plaintiff, 1 A.L.R. 5th 431, is *Gordon v. Livingston*, 12 Mo. App. 267 (1882), which held that a grain inspector who certified the condition of wheat owed no duty to purchaser who relied on certification. The Court concludes that just because defendant had the ability to approve the type of systems to be used to secure its vehicles and tested the efficacy of such systems for that purpose does not establish that defendant owed a duty to plaintiffs to condition its approval on the safety of the system rather than on the system's suitability for its purposes.

The Court finds that plaintiffs have failed to articulate any theory recognized under Missouri law by which a duty of care would be owed by defendant to plaintiffs in this case. Merely because plaintiffs have cited a few cases from jurisdictions throughout the country were non-manufacturers have been subject to liability does not demonstrate that a duty was owed under Missouri law under the facts of this case. As plaintiffs have failed to prove the existence of a duty on the part of defendant, defendant is entitled to summary judgment on plaintiffs' negligence claims.

IV. Conclusion

Accordingly, upon careful consideration, it is hereby ORDERED that defendant General Motors Corporation's motion for summary judgment (Doc. #202) is GRANTED.

s/Fernando J. Gaitan , Jr.
Fernando J. Gaitan, JR.
United States District Judge
Dated: AUG 06 1999
Kansas City, Missouri

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Robert Ford, et al.,
Plaintiffs
vs.
GACS, Inc.,
Defendant.
No. 98-0489-CV-W-2

ORDER

Defendant's motion for judgment as a matter of law or in the alternative, motion for new trial (Doc. #386), filed September 22, 1999, is denied.

Plaintiffs' motion to strike defendants' supplemental exhibits to its suggestions in support of motion for judgment as a matter of law, or in the alternative, motion for new trial(Doc. #389), filed October 8, 1999, is sustained.

Plaintiffs motion to compel payment of expert deposition charges (Doc. #392), filed October 18, 1999 is sustained. Defendant is hereby ordered to issue a check in the amount of $329.50 to plaintiffs' expert, Linda Mars.

Plaintiffs' motion for leave to submit supplemental affidavit and photos in opposition to defendant's post trial motions (doc #394), filed October 22, 1999, is sustained.

Fernando J. Gaitan, Jr.
United States District Judge
Dated: NOV 30 1999
Document #402 Kansas City, Missouri